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INSTITUTE ON NEW FEDERAL RULES

At the request of President Arthur T. Vanderbilt of The American Bar Association, DICTA *is glad to publish the following announcement:*

The Board of Governors of the American Bar Association has arranged a series of lectures of great practical interest to all lawyers to precede the annual meeting of the Association. These lectures will constitute a comprehensive study of the new Federal Rules intended to familiarize lawyers with the historical background as well as the construction and operation of the new rules. They will be of value to all lawyers, since many state courts are considering using the new Federal Rules as a basis for the revision of rules of state practice. The lectures will be given by the following members and officers of the Advisory Committee appointed by the Supreme Court of the United States to draft the rules: Former Attorney General William D. Mitchell, Chairman, Mr. Edgar Bronson Tolman, Secretary, Dean Charles E. Clark of the Yale Law School, Reporter, and Professor Edson R. Sunderland, Professor Wilbur H. Cherry, and Mr. Robert G. Dodge, Members.

These lectures will be held on July 21, 22, and 23, in the Allen Memorial Library of Western Reserve University, Cleveland, Ohio. A registration fee of $5.00 is to be charged to be paid direct to the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois. This fee will include a copy of the printed report of the proceedings.

It is requested that Colorado lawyers intending to register for this Institute communicate with W. C. Carpenter, 300 International Trust Building, Denver, Colorado, Colorado Member of the Special Committee of the American Bar Association on the Institute on Federal Rules, for further information, including a complete program of the lectures.

COLORADO BAR ASSOCIATION MEETING

The annual meeting of The Colorado Bar Association will be held at the Broadmoor Hotel, Colorado Springs, September 9th and 10th.

As a meeting place the Broadmoor Hotel approaches the ideal, but heretofore the rates have seemed prohibitive. The rates promised this year are not only reasonable but very attractive. The following rates ranging from $2.00 up are *quoted for this meeting only:*

ROOM RATES

COLONIAL CLUB

Single:		Double:	
With bath	$3.00	With bath—$2.50 per person	
Detached bath	2.50	Detached bath—$2.00 per person	

MAIN BUILDING

Single—with bath:		Double—with bath:
East side	$3.50	$2.75 per person
Mountain side	4.00	3.00 per person
Few large corners	5.00	4.00 per person

RATES FOR MEALS

Group—Luncheon	$1.00
Group—Dinner	$1.50

Meals a la carte at moderate rates served in the grill at all hours.

The program being arranged for this year will be quite different from those of former years, but is not quite ready for announcement.

One of the guests of honor who will address the Association will be the President of the American Bar Association. Justice Stanley Reed, of the United States Supreme Court, has been invited and has expressed not only a willingness but a desire to accept. He is anxious to visit the West. He will address the Association unless he is obliged to go abroad this summer.

A large attendance is expected, and requests for reservations should be sent direct to the Broadmoor Hotel.

Supreme Court Decisions

EVIDENCE — NEGLIGENCE — JURY — *Girardot vs. Williams* — No. 14189—*Decided June 6, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed.*

FACTS: Parties appeared in reverse order in the trial court, and are hereinafter referred to as there. Plaintiff, a tenant in defendant's apartment house, attempting to burn waste paper in an ashpit, received burns about the face, hands, and arms. Charging this to defendant's negligence, she brought action for $3,000 damages. A jury awarded her $500.

HELD: 1. Defendants are chargeable only with reasonable care and are held only to such knowledge as they actually possessed, or such as reasonable persons, from known conditions, should have possessed.

2. Where facts are not in dispute and absence of negligence is unquestionable, there is nothing to go to a jury. IN DEPARTMENT.

Opinion by Mr. Chief Justice Burke. Mr. Justice Bouck, Mr. Justice Young, and Mr. Justice Knous concur.

The Independent Lumber Company vs. Leatherwood—No. 14198—*Decided June 6, 1938—District Court of Mesa County—Hon. Straud M. Logan, Judge.*

On rehearing, the original opinion, which was previously digested and published, affirming the judgment, is adhered to.

MUNICIPAL CORPORATIONS—TAXATION—LEVY OF GENERAL TAX TO PAY SPECIAL IMPROVEMENT BONDS—DECLARATORY JUDGMENT ACT—CONSTITUTIONAL LAW—*Montgomery vs. City and County of Denver, et al.*—No. 14324—*Decided May 31, 1938—District Court of Denver—Hon. Henry S. Lindsley, Judge—Modified and affirmed.*

FACTS: On December 13, 1937, two ordinances of City and County of Denver were passed and approved, respectively, levying on all taxable property within the city a general tax of 1.409 mills on the dollar, upon the total assessed valuation for the year 1937, and appropriating the proceeds of said levy, amounting to $450,528.52, for the purpose of paying and redeeming special improvement district bonds falling due during the year 1938 and interest thereon, which had heretofore been issued in the name of the city to pay for the construction and

installation of improvements in numerous special improvement districts within the City of Denver and for which redemption sufficient funds would not otherwise be available, although by their terms such bonds and the interest thereon were to be paid by assessments on the specially benefited property in the various districts. Plaintiff in error, who had paid the first half of the tax under protest, as a taxpayer, instituted this action to secure a declaratory judgment that such general tax be held invalid on constitutional grounds and because in conflict with certain charter provisions, and sought refund for himself, and those similarly situated, of taxes paid and to be paid under said levy.

HELD: 1. The Supreme Court will not decide questions "which have not yet arisen and which may never arise"; nor will it reply to mere "speculative inquiries."

2. The appellate court will not determine the validity of certain proposed refunding bonds with reference to which no ordinance has been adopted or even introduced.

3. It is without the purview of the Declaratory Judgment Act to determine the status of possible refunds to taxpayers of taxes paid in previous years and under different ordinances than those here involved and to announce the legal effect of the payment of such taxes under protest without the presence of any of the taxpayers as parties to this proceeding.

4. The Denver City Council, at least in the case of special improvement bonds not guaranteed, except where 80% of said improvement district bonds have already been paid, has no general authority as a matter of public welfare, or otherwise, to levy a general tax to pay defaulted portions of special improvement district bonds, and, therefore, in so far as the levy under consideration is devoted to the payment of such bonds or interest thereon in districts which have not discharged 80% of their outstanding bonds, it was unauthorized.

5. Special improvement bonds, although not a debt of the municipality in the constitutional sense of the word, nor an obligation which is payable from general funds, if issued in the name of the municipality, to be paid only from a special fund created by the enabling act and so limited on the face of the obligation, are bonds of the municipality.

6. The City Charter provision, providing that whenever a public improvement district has paid out and cancelled four-fifths of its outstanding bonds and there is insufficient money in the surplus or deficiency fund to pay the remaining bonds, the city shall pay such bonds when due and reimburse itself by collecting the unpaid assessments due the district, is constitutional.

7. " 'The idea of a "debt" in the constitutional sense is that an obligation has arisen out of contract, express or implied, which entitles the creditor unconditionally to receive from the debtor a sum of money, which the debtor is under a legal, equitable, or moral duty to pay without regard to any future contingency.' "

8. The charter provision does not create a debt within the mean-

ing of that word as used in Section 8, Article XI of the Constitution. EN BANC.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke and Mr. Justice Bakke concur. Mr. Justice Hilliard, Mr. Justice Bouck, and Mr. Justice Holland concur in part and dissent in part. Mr. Justice Young specially concurs in part and dissents in part.

CREDITOR'S BILL IN EQUITY TO SET ASIDE CONVEYANCES BY BANKRUPT—STATUTE OF LIMITATIONS—FRAUD—*Bowman, etc. vs. May et al.*—No. 14199—*Decided May 31,1938—District Court of Denver—Hon. James C. Starkweather, Judge—Affirmed.*

FACTS: Action by trustee in bankruptcy in nature of creditor's bill to set aside conveyances of property by bankrupt to his mother-in-law and wife. Trial court entered judgment in favor of grantees.

HELD: 1. Supreme Court will not disturb judgment of trial court based upon conflicting evidence as to consideration passing for conveyance of real and personal property to relatives of bankrupt, prior to bankruptcy.

2. Where judgment is obtained against bankrupt in 1929, but execution is not issued until 1934, upon the return of which creditor learned of alleged fraudulent conveyances, and nothing appears to explain the reason for the five year delay intervening between the entry of judgment and the issuance of the execution, the three year statute of limitations applies.

3. " 'Courts of equity will not interfere if a party slumbers on his rights or the means of detecting the fraud.' "

4. Full possession of the means of detecting a fraud is equivalent to knowledge. IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

WILLS—U. S. GOVERNMENT BONDS—PAYEE THEREOF—EVIDENCE—CONSTITUTIONAL LAW—*In re Stanley, Deceased. Meyer vs. Mercier*—No. 14253—*Decided May 31, 1938—District Court of Las Animas County—Hon. David M. Ralston, Judge—Affirmed.*

FACTS: S left will providing that all of her property in her possession at time of her death should be divided equally among Meyer, Decker and Mercier. At the time of her death, U. S. Government baby bonds, payable to S or Mercier were found in her safety deposit box. Mercier claims ownership and Meyer claims that the bonds should be sold and divided among the three legatees.

HELD: 1. Where the U. S. Government baby bonds specifically incorporate therein by reference regulations of the treasury department

as to whom the bonds may be made payable, such regulations are admissible in evidence.

2. Section 4 of the enabling act to the State Constitution says the members of the convention shall declare " 'that they adopt the Constitution of the United States' "; Section 2 of Article VI of the Federal Constitution says, " 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, * * * shall be the supreme law of the land, and the judges in every state shall be bound thereby; * * *.' "

3. Under the Federal laws and regulations, the bonds become the property of Mercier upon the death of S, and need not be divided among the legatees. IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

PETITIONS FOR INITIATED MEASURES—INTERVENTION BY CITIZENS —*Brownlow, et al. vs. Wunch, et al.*—No. 14330—*Decided May 31, 1938—District Court of Denver—Hon. Geo. F. Dunklee, Judge—Affirmed.*

HELD: 1. If the Secretary of State refuses to file or refile a tendered petition to initiate a measure and mandamus is brought to compel him to do so, a citizen who feels that he will be injured by the proposed amendment does not have such an interest in the matter in litigation, or in the success of either of the parties to the action to enable him to intervene.

2. The filing of such a petition is a ministerial act. The Secretary of State may in his discretion determine whether there has been a compliance with the necessary legal prerequisites to entitle the petition to be filed. If he determines that there has been, he may file it. If he determines that there has not, he may refuse, as he did in this case. No persons other than the Secretary of State and proponents have any interest in the controversy.

2. "The judgment in a mandamus suit may be, that a ministerial officer—where there is a clear legal duty—*shall* perform, or, where the duty does not appear, that he *need not* perform; but never that he *shall not* perform." EN BANC.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke dissents. Mr. Justice Holland not participating.

CONSTITUTIONAL LAW—DECLARATORY JUDGMENT—SERVICE TAX —*Rinn vs. Bedford, etc.*—No. 14275—*Decided May 31, 1938—District Court of Boulder County—Hon. Claude C. Coffin, Judge —Affirmed.*

HELD: 1. Before an act will be held unconstitutional under the

procedure of the Declaratory Judgment Act, it is necessary to show the unconstitutionality beyond a reasonable doubt.

2. "No person is entitled to assail the constitutionality of a statute except as he himself is adversely affected."

3. "The attack must be restricted to such matters as are necessarily involved in the particular case."

4. The courts have nothing to do with that part of an argument which partakes of the nature of discussion as to whether the policy represented by the Act is good or bad.

5. The court finds no uncertainty in that part of the Service Tax Act which the plaintiff has a right to question; and, therefore, the Act will not be held to be unconstitutional for uncertainty.

6. Plaintiff may not concern himself about the exaction of the tax on services rendered to or for him by others. He may take the service as offered or leave it.

7. There is no distinction in principle between causing an attorney to collect the tax on his services and remit it to the State, and causing a gasoline dispenser to collect and remit the gasoline tax. That one is a service tax and the other a sales tax makes no difference.

8. The title of the Act, "an act providing for additional public revenue," does not contravene Section 21, Article V of the Colorado Constitution. The matter of providing in detail the process of collecting the additional revenue is clearly included within, and germane to, the connotation of the general title.

9. "The exemptions are apparently based upon legitimate legislative classification of which the plaintiff cannot complain."

10. The allegations of the complaint do not entitle plaintiff to raise an issue as to whether the Act unlawfully makes him personally liable for payment of the tax by those he serves, or as to whether the Act is in controvention of Section 12 in Article II of the Colorado court which prohibits imprisonment for debt. EN BANC.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Holland dissent.

CRIMINAL LAW—RAPE—INDECENT LIBERTIES—PRESUMPTION IN FAVOR OF JUDGMENT—FORMER JEOPARDY—*Lambert vs. People* —No. 14328—*Decided May 23, 1938*—*District Court of Denver* —*Hon. Henry S. Lindsley, Judge*—*Affirmed.*

FACTS: Plaintiff charged on first count with statutory rape, and on second count with taking indecent liberties with same girl on same day. He pleaded guilty to the second count and was tried and found guilty of the first. He was sentenced to a term of from 9 to 10 years on the second count and 20 to 25 years on the first, sentences to run concurrently. Defendant contends that his plea of guilty and sentence thereon

amounted to former jeopardy and that he could not be tried on the statutory rape count.

HELD: 1. Where it is moved by the District Attorney, with the consent of the defendant, that the evidence on the rape case be considered by the court as the evidence to guide it in fixing the punishment in the other and where the evidence is not before the appellate court, it will assume that the evidence established both offenses under the rule that all presumptions are in favor of the judgment.

2. "* * * Since the sentences were imposed at the same time and run concurrently, defendant is not injured unless it be assumed that by his plea to the second count, at a time when court and counsel could not know what the evidence would develop, he had a right to thus trick them into a position forestalling prosecution for a serious offense by a plea of guilty to one of lesser grade, and that he did so." The law is against such juggling. IN DEPARTMENT.

Opinion by Mr. Chief Justice Burke. Mr. Justice Young, Mr. Justice Bakke and Mr. Justice Knous concur.

WILLS—CONTEST—ARGUMENT—UNDUE INFLUENCE—EVIDENCE—INSTRUCTIONS—*In re Estate of Rentfro. Allen et al. vs. Rentfro*—No. 14192—*Decided May 23, 1938—District Court of Alamosa County—Hon. John I. Palmer, Judge—Reversed.*

HELD: 1. Where, in a will contest, the contention is made that the will was not legally attested, and no argument is made on the point, it is considered as having been waived.

2. Where it appears that the testator was of clear mind, recognized people in the room, had been given some drugs prior to signing the will, that the doctors testified that he was not mentally incapacitated, that the will was made in accordance with a notation he had had prepared some days previously, except that in the will he left a bequest to a daughter by a former marriage, there is not sufficient testimony upon which to hold that the testator was mentally incapacitated.

3. Evidence reviewed and found not to sustain contention that chief beneficiary used undue influence.

4. Mere kindness of treatment, or reasonable solicitation, entreaty or persuasion, and without restraint, would not be sufficient to vitiate a will.

5. Instructions reviewed and found to properly state the law. IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Knous and Mr. Justice Holland concur.

WILLS—TESTIMONY—EVIDENCE—COMPROMISE—ATTESTING WITNESSES—*Ainsworth vs. Ainsworth, et al.*—No. 14081—*Decided May 23, 1938—District Court of Denver—Hon. Frank McDonough, Sr., Judge—Affirmed.*

FACTS: Contest between two brothers over their mother's will, plaintiff in error, Robert, being the contestant, and the proponent is Alfred, defendant in error.

HELD: 1. Testimony as to undue influence, covering a period of approximately three years is admissible; but, transactions occurring as long as 25 years prior to the making of a will are not admissible.

2. An offer of compromise occurring after the contents of the will were disclosed is not admissible in evidence.

3. The fact that two employees of the testatrix, who were attesting witnesses, would get a bonus together with other employees, because of the cancellation of an $8,000 mortgage debt owing the testatrix by the corporation did not make them have a "present, certain and vested" interest as would disqualify them as witnesses, and thus void the will, which would result because of insufficient attestation. IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Knous and Mr. Justice Holland concur.

WITNESSES—ATTORNEY TESTIFYING—MINORS—*Lee vs. Leibold*—No. 14306—*Decided May 23, 1938—District Court of Denver—Hon. Joseph J. Walsh, Judge—Reversed.*

FACTS: 1. Where an attorney is engaged by the "next friend" of an infant to prosecute a claim against an estate in behalf of the infant, on a contingent basis to be paid from the anticipated proceeds, he is not directly interested in the event of the proceedings within the contemplation of the statute so as to disqualify him from testifying on behalf of the infant claimant. This is so because of the general rule that, "It is evidently a necessary incident to the duty of conducting a suit or maintaining a defense for an infant that the next friend or guardian ad litem should have the power of selecting and employing counsel. But he has no power to bind the infant or his estate by a contract as to the compensation to be paid." EN BANC.

Opinion by Mr. Justice Knous. Mr. Justice Hilliard and Mr. Justice Bouck not participating. Mr. Justice Holland dissenting.

NEGLIGENCE—AUTOMOBILES—STATUTES AND RULES OF ROAD—*Parrish vs. Smith*—No. 14195—*Decided April 11, 1938—District Court of Teller County—Hon. John M. Meikle, Judge—Reversed.*

FACTS: S obtained judgment against P for damages for personal injuries sustained by him resulting from a collision between an automo-

bile in which he was riding and P's truck. At the place of collision, a new highway was in course of construction, at some places crossing the old road and at others following its course. The vehicles collided at one end of a cut through which all travel had to pass. All of the surface of the highway within the cut was broken up and had obstructions upon it. It permitted one way traffic which had made deep tracks. P's truck was just about to emerge from the one way passage when the collision occurred. The condition of the road and the presence of the vehicles were known to all parties. Lower court refused to sustain motion for non-suit.

HELD: 1. The trial court should have sustained the motion for non-suit, for the accident was caused by the negligence of the driver of the car in which plaintiff was riding.

2. The statute providing that all vehicles on state highways shall pass each other to the right is not applicable to the case, in view of the surrounding circumstances, in that the accident did not happen on a traveled or defined roadway.

3. Statutes and rules of road are designed to govern traffic upon highways that are prepared for use as such; and are applicable only to permanent lines of travel.

4. It was error for the court to give an instruction requiring the defendant to give half of the cut to the plaintiff, under the conditions of the road.

5. Where the accident resulting in injury to the passenger is caused by the driver of his car, and no negligence on the part of the operator of the other vehicle exists, the passenger may not recover from the owner of the second vehicle.

Opinion by Mr. Justice Holland. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Knous dissent.

WATER-RATE BASE — OWNERSHIP — MINIMUM OPERATING AND MAINTENANCE EXPENSE—*The Board of Water Commissioners of Jefferson County, et al. vs. The Rocky Mountain Water Company*—No. 14125—*Decided April 4, 1938*—*District Court of Jefferson County*—*Hon. Robert W. Steele, Judge*—*Reversed.*

FACTS: The judgment of the District Court, which the board seeks to reverse, enjoined as unreasonable and confiscatory the enforcement of a rate of $2.50 an inch, fixed by the board under section 143, chapter 90, C. S. A. 1935, as the carrying charge for water conveyed by the company through its ditch to a large number of consumers.

The principal contentions between the parties is whether or not the whole or any part of the value of the water rights involved should be included in the rate base, and whether or not the court was in error in failing to find the reasonable annual *minimum* operating expenses and

maintenance charges which, together with 6% return on the rate base, must be produced in order to prevent confiscation.

HELD: 1. The ownership of water remains in the public, with a perpetual right to its use, free of charge, in the people. A carrier does not become a proprietor of the water diverted.

2. The carrier's diversion from the natural stream must unite with the consumer's use in order that there may be a complete appropriation within the meaning of our fundamental law.

3. The value of the water and appropriation under which it is carried is not a proper component of the rate base for a ditch company.

4. In the view the court has taken of what properly constitutes the rate base, a finding of *minimum* operating and maintenance expense is imperative. EN BANC.

Opinion by Mr. Justice Young.

PLEADINGS—MOTIONS—*Zimmerman vs. Hinderlider, State Engineer et al.*—No. 14214—*Decided April 4, 1938—District Court of Larimer County—Hon. Frederic W. Clark, Judge—Reversed.*

HELD: 1. In general, as to motions directed to pleadings and points made or which could have been made thereby, the holding is that the filing of demurrers or answers operates as a waiver thereof. To this general rule an exception seems to exist as to motions urged in the interest of separation of causes, and this only is so where the motion to require separation was timely, but was wrongly denied. IN DEPARTMENT.

Opinion by Mr. Justice Hilliard.

MINING LAW—LODE CLAIM—PLACER CLAIM—PROCEDURE—LAND DEPARTMENT—HOMESTEADS—*McMullin, et al. vs. Magnuson*—No. 14005—*Decided April 4, 1938—District Court of Fremont County—Hon. James L. Cooper, Judge—Corrected and affirmed.*

FACTS: On March 1, 1928, the "Mica Lode" was located as a lode mining claim by the predecessors in interest of Colorado Feldspar Company, one of the defendants in error and the now lode claimant.

The "Mica Hill Placer No. 1" containing 160 acres covering the Mica Lode and all other claims mentioned, was filed as a placer on September 16, 1933, by the plaintiffs in error, who are now the placer claimants.

After the issues were framed, we find the rival groups of defendants arrayed to finally litigate on the merits of their respective mineral locations, with the original plaintiffs, the lessees, disinterestedly standing by awaiting a determination of this issue in order that they might be advised as to which locator the royalties, accrued and to accrue, should be paid.

HELD: 1. A placer location cannot be made upon rock in place bearing valuable mineral. If the mineral substance is not found in veins of rock in place, the ground would be subject to placer location.

2. The origin or method of formation of a mineral body is not controlling in determining whether the ground is subject to location as a lode or placer.

3. When a suit is already pending between the same parties for the recovery of the ground in conflict at the time of the filing of the adverse claim, it has been held that such suit may stand as a suit to support the adverse and no new suit need be brought.

4. The matters presented to review in the appellate court should be limited to questions submitted to, and passed upon by, the trial tribunal.

5. An adverse suit may be determined by the court without a jury, if no demand is made for a jury, and silence is deemed to be an acquiescence in the procedure followed.

6. The question whether a mineral deposit is subject to location as a lode or placer is not exclusively within the jurisdiction of the Land Department, and may be adjudicated by a court in determining the right of possession to the ground in controversy.

7. A controversy over rights of a homesteader must be between the mineral locator or operator and the homestead entryman or patentee in such capacities, and can have no bearing on the rights of claimants under conflicting mineral location. EN BANC.

Opinion by Mr. Justice Knous.

COUNTY COURT—DISMISSAL OF APPEAL FROM JUSTICE COURT—*The Poudre River Oil Corporation vs. Flake*—No. 14213—*Decided April 4, 1938—County Court of Larimer County—Hon. Albert P. Fischer, Judge—Reversed.*

FACTS: Flake recovered a money judgment before the Justice of the Peace against the plaintiff in error which duly perfected an appeal to the County Court. Thereafter, the case was repeatedly set for trial in the County Court, but each setting was vacated for one reason or another. Finally, a hearing was had on Flake's motion to dismiss the appeal, and on the corporation's motion to dismiss the case itself. The Court refused to dismiss the case, but dismissed the appeal.

HELD: 1. When once the case was properly lodged in the County Court, the appeal could not be summarily dismissed. When a case is effectually appealed from a Justice Court, it must thereafter be dealt with as is any other case pending in the County Court. EN BANC.

Opinion by Mr. Justice Bouck.

LEGISLATION-GENERAL — COUNTY TREASURER—SALARY-CHANGE AFTER ELECTION—*Young vs. Board of County Commissioners of Park County, et. al*—No. 14114—*Decided March 28, 1938*—*District Court of Park County*—*Hon. James L. Cooper, Judge*—*Affirmed.*

FACTS: Young is County Treasurer and Ex-officio Public Trustee of Park County. As the latter officer, he earned approximately $125.00 in fees, to which he maintains his right as compensation. The question is whether he, as public trustee, or the county is entitled to the fees.

HELD: 1. An act which makes a reasonable classification of counties, and is equally applicable to all counties of a given class is general legislation and not special.

2. An act, passed in 1933, and which "shall be effective on and after January 15, 1935," providing that the public trustee of the county should receive no compensation beyond what he drew as county treasurer was notice to Young, who took office November 6, 1934, that it was the law in Colorado on and after January 15, 1935, and hence, was not a diminution of his salary or emoluments "after his election." EN BANC.

Opinion by Mr. Chief Justice Burke. Mr. Justice Bouck concurs in the result. Mr. Justice Knous not participating.

AGENCY — CONTRACTS — OPTIONS — COMMITTEES—FAILURE TO PERFORM AS CONTRACTED—*Amidon, et al. vs. Bettex*—No. 14161—*Decided April 4, 1938*—*District Court of Yuma County*—*Hon. Arlington Taylor, Judge*—*Affirmed.*

FACTS: Action by Bettex, the plaintiff, for recovery of real estate broker's commission claimed to be due him from defendants. Defendants comprised a bond holders committee representing the holders of $12,900 of an $18,000 bond issue against a ranch. On June 6, 1934, the committee had commenced foreclosure proceedings under the terms of the mortgage, and on that day gave to plaintiff an option to sell the ranch for $9,000 cash, and instrument also reciting that committee was to be bound as such and not as individuals. Plaintiff got a purchaser for $8,500. The committee contracted to sell to him, and $2,500 was placed in escrow in a bank. The foreclosure was completed, but neither the committee nor the purchaser bid at the foreclosure sale, and the certificate of purchase was acquired by another party. Plaintiff made claim to the committee for his commission and upon refusal brought this action against the members as individuals.

HELD: 1. The contract to sell constituted an entirely new and independent agreement and was wholly independent of the option relied upon by the defendants.

2. If an agent exceeds his authority, by reason of which his principal is not bound by his actions, the agent becomes liable for any damage thereby occasioned to the other party to a contract.

3. If the committee was authorized by the note holders to enter into the subsequent ngotiations which provided for the payment of a commission, and further, for certain conditions to be performed by the committee, then when the committee failed to perform its undeniable part of the contract to the damage of plaintiff, the members thereof become liable individually. IN DEPARTMENT.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Bakke concur.

TRADE FIXTURES—MILLS—CONTRACT—*Webb vs. The Empire Chief Mining Company*—No. 14104—*Decided April 4, 1938—District Court of Hinsdale County—Hon. Straud M. Logan, Judge—Affirmed.*

FACTS: Action to determine ownership of a mill erected by plaintiff in error on certain mining properties belonging to the defendant in error.

HELD: 1. The case law pertaining to trade fixtures, as between landlord and tenant, is not so substantial as to prevail over positive provisions of a lease regarding said fixtures. IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

WILLS—RULE OF CY PRES—INTENT OF TESTATOR—*Fisher, et al. vs. Minshall, et al.*—No. 14053—*Decided March 21, 1938—District Court of Adams County—Hon. Samuel W. Johnson, Judge —Reversed.*

HELD: 1. Although to a certain extent, 43rd Elizabeth Chap. 4, doctrine of cy pres, is a part of the law of Colorado, its details and remedies are not. Nevertheless, under their ordinary equity powers, the Courts of Colorado may make such modifications and alterations in charitable bequsts, otherwise impossible of exact execution, as are consistent with the testator's intent.

2. The controlling element in the interpretation of wills is the intent of the testator, and that intent must be "manifest from the instrument itself." IN DEPARTMENT.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Young and Mr. Justice Bakke, concur.

LEASES—TERMINATION OF BY NOTICE—TENANCY BY SUFFERANCE —RENT—*Barlow and The National Oil Corporation vs. Hoffman, et al.*—No. 14049—*Decided March 21, 1938*—*District Court of Denver*—*Hon. Frank McDonough, Sr., Judge*—*Reversed in part.*

HELD: 1. Where a lease has been terminated by the lessor's notice, the tenancy from then on is a mere tenancy by sufferance or at will with an obligation to pay, not the rent provided by the lease, but whatever the use of the premises is reasonably worth. IN DEPARTMENT.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Knous concur.

PUBLIC UTILITIES COMMISSION—PERMITS—RIGHT TO CLARIFY—*The Public Utilities Commission of Colorado, and Bennie Goldstein vs. Weicker Transportation Company, et al.*—No. 14278—*Decided March 21, 1938*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Reversed.*

HELD: 1. The Public Utilities Commission is clothed with general powers to regulate and control carriers for hire within the state, and Courts will not interfere with its administrative rulings when they are just and reasonable; procedure before it should not be tested by the technical rules of pleading.

2. The Commission has the authority to clarify a permit to transport freight for hire issued to a private carrier, so as to include intermediate points on his route, when such intermediate points were not mentioned in his application or permit. EN BANC.

Opinion by Mr. Justice Bakke.

CRIMINAL LAW—SETTLEMENTS AS AFFECTING CRIMINAL LIABILITY —*Hammons vs. The People of the State of Colorado*—No. 14290 —*Decided March 14, 1938*—*District Court of Las Animas County*—*Hon. David M. Ralston, Judge*—*Affirmed.*

FACTS: Plaintiff in error is hereinafter referred to as defendant. On a verdict of guilty of the larceny of $250.00, he was sentenced to the state reformatory. The sole question is whether the verdict is supported by the evidence.

HELD: 1. Victims of larceny are not obliged to make a complaint.

2. The settlement by the victim with the culprit, by taking from him an acknowledgment of the amount, graciously dubbed "borrowed," is no defense to his criminal liability. IN DEPARTMENT.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard, Mr. Justice Bakke and Mr. Justice Holland, concur.

ELECTIONS—TIE ELECTION—DESTRUCTION OF BALLOTS—*Gallegos vs. Waybrant*—No. 14236—*Decided March 21, 1938*—*County Court of Costilla County—Hon. Jose Carpio Valdez, Judge—Affirmed.*

FACTS: The judgment sought to be reversed was rendered in an election contest involving the office of Secretary for the School Board of the Fort Garland School district. The contestant is Waybrant, a voter; the contestee is Gallegos, who, as one of the three candidates for the office, received a certificate of election.

Gallegos, Parsons and Maes, the candidates, were credited with 100, 98 and 58 votes, respectively.

The Trial Court entered judgment ordering a new election upon hearing evidence that within twenty minutes after the counting of the ballots and over the protests of the two acting judges of the election, the ballot box, together with the ballots therein, the poll books, the certificate of return, and the registration list of voters were, at the instance of divers persons present, taken, burned and wholly destroyed; and that the certificate of election made in favor of Gallegos was based wholly upon hearsay testimony and evidence.

HELD: 1. The affidavits of two persons stating that they were not qualified to vote and had voted for Gallegos made the election a tie at 98 for Gallegos and 98 for Parsons, and the County Court was justified in ordering a new election. IN DEPARTMENT.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Knous concur.

WORKMEN'S COMPENSATION—DEPENDENCY—WHAT CONSTITUTES—PRESUMPTIONS—*The Empire Zinc Company vs. Industrial Commission of Colorado, Elizabeth Holden, minor sister, et al.*—No. 14220—*Decided March 21, 1938*—*District Court of Eagle County—Hon. William H. Luby, Judge—Affirmed.*

FACTS: Elizabeth Holden, as claimant, made claim as a dependent to the Industrial Commission, on account of the injury and death of her brother, John Holden, while in the employ of the Empire Zinc Company. Her claim was allowed and an award made thereon by the commission, and upon review was affirmed by the District Court.

HELD: 1. Claimant, being a sister of deceased, there is no presumption of her dependency, and the burden was upon her to establish such dependency as would bring her within the provisions of the statute.

2. An anticipation by a dependent of a continuation of the already established status of dependency, without a suggestion of its termination, is the true guide in determining whether or not she was in fact a dependent. EN BANC.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke, and Mr. Justice Hilliard dissenting. Mr. Justice Bouck, not participating.

WILLS—CAVEATS—TESTIMONY OF BENEFICIARY—COMPLIANCE WITH THE STATUTE—*In Re: Estate of Albert S. Livingston, Deceased, Petition for Probate of Will; Edward L. Shaffer, Proponent vs. District Court, Second Judicial District, Division Two, Hon. Otto Bock president and Robert Edwin Livingston, Heir and Legatee*—No. 14289—*Decided March 21, 1938*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: Action involving the probate of the alleged last Will and Testament of Albert S. Livingston, deceased. Probate was denied in the County Court, and on appeal to the District Court, the issue was tried to a jury, which also found against the proponent. The District Judge is named as Defendant in error because of alleged usurpation of conduct of proponent's case at the trial.

The preponderance of the evidence was against the proper execution, publication and declaration of the will.

HELD: 1. The fact that a will is fair on its face does not entitle the proponent to have it admitted to probate, if the proponent fails in the duty which the law places on him.

2. Court did not err in refusing the proffered testimony of the principal beneficiary under the will, who was the admitted author of it.

3. "The record as made by the proponents themselves showed a lack of compliance with the essential provisions of our statute concerning the execution and attestation of wills." IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Holland concur.

CONTRACTS—VOIDANCE OF BY INFANT—REPLEVIN—DEMURRER—STATUS QUO—*Mosko, doing business as Denver Motor Finance Company vs. Forsythe*—No. 14292—*Decided February 28, 1938*—*County Court of Arapahoe County*—*Hon. Henry Bruce Teller, Judge*—*Reversed and Remanded.*

FACTS: Plaintiff sold an automobile to defendant, who was an infant, without any knowledge of defendant's infancy. As part payment, defendant gave, and plaintiff accepted a Ford automobile. Defendant executed and delivered to plaintiff his note and chattel mortgage for the balance of the purchase price. Defendant paid three installments and then rescinded, disaffirmed and repudiated the entire transaction including the note and chattel mortgage and so notified the plaintiff. Defendant claims that he offered to return the automobile delivered to him by plaintiff, if plaintiff would restore to him the Ford automobile which defendant had traded in, or its value, together with the three monthly payments made to plaintiff. Plaintiff brought a replevin suit and defendant answered, and asked the Court to be placed in status quo. Plaintiff's demurrer to this answer was overruled and he elected to stand thereon.

HELD: 1. The relative rights of both parties does not enter into the question of the right to possession, which is the only question involved in a replevin action.

2. When defendant elected to disaffirm and void the contract, it became invalid ab initio, the parties thereto reverted to the same position as if the contract never had been made, and neither is bound by any part of the contract when once rescinded.

3. Upon voidance of the contract by the infant, he then having in his possession the specific property received by him through the transaction, he was required to return same to plaintiff as a prerequisite to such voidance.

4. The right of the defendant infant to disaffirm and void his contract is an absolute and paramount right which carries with it the right to be placed in status quo relative thereto. IN DEPARTMENT.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Bakke concur.

JOINT BANK ACCOUNTS—ESTATES—PREFERRED CLAIMS—SURVIVORSHIP — RES JUDICATA — ESTOPPEL—INTEREST—ISSUES OF FACT—TRIAL COURT—*May Youngquest vs. Bell Youngquest*—No. 14283—*Decided February 28, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Judgment modified and as modified, affirmed.*

FACT: Plaintiff is the administratrix of the estate of William C. Youngquest. At the time of deceased's death, there was a checking account of $5,800.00, which was carried on the banks records as the joint account of deceased and defendant. The County Court, in an ex parte proceeding, issued an order restraining the bank from paying out or otherwise disposing of the funds in the mentioned account, until further order of Court, but upon a petition filed by defendant praying that the restraining order be dissolved, the County Court found in favor of defendant. Upon appeal, the District Court held with the administratrix. During the pendency of the proceedings last mentioned, which were based upon the alleged existence of a joint bank account to which the defendant asserted a right under the doctrine of survivorship, the defendant filed a claim against the estate for $1,800.00, alleged to be her private funds which were deposited by her in the mentioned account, and $3,107.50 for services and $67.50 advanced by defendant to pay taxes for deceased. The County Court denied the claim, except as to the tax payment. Upon appeal, the District Court allowed the item of $1,800.00 as a preferred claim against the estate and denied the claim for services.

HELD: 1. Issues of fact determined by the trial Court, cannot be considered by the higher tribunal if the claimant has failed to file a motion for a new trial or secure an order dispensing therewith.

2. Res judicata or an estoppel will not apply to the $1,800.00 because the former case was based upon an alleged joint bank account, and the present case is based upon decedent's bank account.

3. In this case claimant is not entitled to any interest prior to the time her claim ripened into a judgment.

4. A claim cannot be accorded any preferred status unless it is filed within six months after the granting of letters of administration. IN DEPARTMENT.

Opinion by Mr. Justice Knous. Mr. Chief Justice Burke, Mr. Justice Hilliard and Mr. Justice Bakke concur.

ALIMONY—ABUSE OF DISCRETION BY TRIAL COURT—*Rodgers vs. Rodgers*—No. 14216—*Decided February 28, 1938—District Court of Denver—Hon. George F. Dunklee, Judge—Reversed and Remanded.*

FACTS: Plaintiff in error, who was plaintiff below, seeks reversal of a judgment denying her further alimony as the divorced wife of the defendant.

HELD: 1. Awarding alimony and fixing the amount thereof rests in the sound discretion of the trial Court, and, unless it is made to appear that there has been an abuse of discretion, its judgment will not be disturbed.

2. A Court rendering a decree of divorce retains jurisdiction to modify provisions for alimony as changed conditions of the parties may render necessary and proper. IN DEPARTMENT.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Holland, concur.

QUIET TITLE—REMOVAL OF CLOUD ON TITLE—LEGAL CLAIM—EQUITY—*Harrison vs. City and County of Denver*—No. 14227—*Decided February 28, 1938—District Court of Grand County—Hon. Charles E. Herrick, Judge—Affirmed.*

FACTS: Plaintiff, who was one of the defendants in the District Court, prosecutes a writ of error to reverse a judgment in favor of the City. The complaint on which judgment was rendered was styled by the City, "Amended Complaint to remove cloud on title." Plaintiff contends that the complaint does not state a cause of action in that the City fails to allege that it was in possession of the property at the time suit was instituted, and this being a quiet title suit, possession is a condition precedent to maintaining a cause of action.

HELD: 1. The plaintiff is not limited to a quiet title action, but may bring a general equitable suit for the specific purpose of re-

moving the cloud, in which case there is no requirement by statute that the plaintiff be in possession.

2. One who owns an undivided three-fourths interest in a specific tract of real property has a legal claim therein, and is entitled under the statute to redeem. IN DEPARTMENT.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke and Mr. Justice Bouck and Mr. Justice Knous concur.

DEDICATION OF ROADS—USER—ENTRY OF LAND—*Leach vs. Manhart and Rhodes*—No. 14075—*Decided February 28, 1938—District Court of Douglas County—Hon. John M. Meikle, Judge—Reversed.*

FACTS: Suit by defendants in error, to enjoin plaintiff in error from using a road through their properties which had been enjoyed by the public for over half a century. Manhart now owns the Gerber land, but over which the road does not cross, whose entry was made preceding the establishment of the road.

HELD: 1. The Gerber land is not burdened with the road; hence, the date of its entry is unimportant and will not extend to Manhart's entire holdings.

2. Statute expressly dedicates a right-of-way for roads over unappropriated government land, acceptance of which by the public results from "use of those for whom it was necessary or convenient." (R. S., Sec. 2477, U. S. Comp. Stat. 1918, Sec. 4919, Title 43, U. S. C.A., Sec. 932.) IN DEPARTMENT.

Opinion by Mr. Justice Hilliard. Mr. Chief Justice Burke, Mr. Justice Bakke and Mr. Justice Holland concur.

WORKMEN'S COMPENSATION—BURDEN OF PROOF—QUESTIONS OF FACT AND OF LAW—COURSE OF EMPLOYMENT—*Industrial Commission of Colorado, et al. vs. Stebbins*—No. 14281—*Decided March 7, 1938—District Court of Denver—Hon. Otto Bock, Judge—Affirmed.*

HELD: 1. Ordinarily, the claimant has the burden of proving his claim, but where it is admitted that the employee was at work in the course of his employment shortly preceding the time of his accident, it becomes the duty of the employer to show that the employee had left it, where employer relies on the defense that the employee was not acting in the course of his employment at the time of the injury.

2. When the record evidence establishes that the employee was acting within the scope of his employment at the time of his accident, no evidence appearing to the contrary, there can properly be no finding that he was not so acting. In such circumstances, the reviewing court is passing upon a question of law and not upon the facts. EN BANC.

Opinion by Mr. Justice Bakke. Mr. Justice Bouck dissents.

WATERRIGHTS—DOCTRINE OF RELATION—PRIORITIES—NOTICE—*San Luis Roller Mills vs. San Luis Power and Water Company*—No. 13909—*Decided March 7, 1938*—*District Court of Costilla County*—*Hon. John I. Palmer, Judge*—*Reversed in part.*

FACTS: The Mill Company claims a priority as of March 1, 1908. The Water Company claims a priority to the same water as of July 28, 1908. Each of the two parties and its predecessor in interest, failed to file a map and statement with the State Engineer within the sixty days provided for such filing under the statute then in force. The question is whether under the evidence the district court was right in substituting—as the Mills, Inc., priority date—the date of August 20, 1909, the time when the water was actually diverted.

HELD: 1. The trial Court based its decision solely upon the view that initiation of the Mills, Inc., claim was futile because lacking "an open and notorious physical demonstration" sufficient "to constitute notice to the world." But notice to the world does not mean a notice to every inhabitant of the world. It merely means a notice reasonably likely to bring knowledge to everyone within the sphere of possible adverse interest. EN BANC.

ESTATES—CREDITORS—ALLOWANCES—*In re: Estate of Sabin, et al. vs. Lora Sabin*—No. 14191—*Decided March 7, 1938*—*County Court of Pueblo County*—*Hon. Hubert Glover, Judge*—*Affirmed.*

FACTS: Fred A. Sabin died leaving a will that was duly admitted to probate. The controversy is over a claim presented by the testator's widow, Zora Sabin, as creditor. Plaintiffs in error contend that the County Court erred by allowing the claim and by not deducting various items alleged to be proper charges against the claimant.

HELD: 1. Evidence was presented by plaintiffs in error tending to show legitimate charges which would substantially reduce recovery. However, these matters constituted issues of fact. It was for the trial Court to consider all the evidence, and as the lawful fact finding tribunal it came to conclusions by which the Supreme Court is bound. IN DEPARTMENT.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Knous concur.

WORKMEN'S COMPENSATION—PROCEDURE—JURISDICTION—PETITION FOR REVIEW OF COMMISSION'S FINDINGS—*Industrial Commission of Colorado et al. vs. Martinez*—No. 14233—*Decided January 17, 1938*—*District Court of Las Animas County*—*Hon. John L. East, Judge*—*Reversed.*

FACTS: Deceased was employed by a coal company whose compensation insurance was carried by the State Compensation Insurance

Fund. He met his death as the result of compensable accident. The claimants filed with the commission, whose referee found in their favor, and awarded $2,985.00. On petition for review, the commission itself fixed the same amount. Claimants took the cause to the District Court where the award was increased to $3,545.00.

HELD: 1. The judgment is reversed because the District Court never had jurisdiction for "no action, proceeding or suit to set aside, vacate or amend any finding, order or award of the commission, or to enjoin the enforcement thereof, shall be brought unless the plaintiff shall have first applied to the commission for a review as" provided by the Workmen's Compensation Act.

2. Although the point was not raised below, the Supreme Court will take cognizance of it since it is jurisdictional.

3. A petition to the commission asking that it review the findings of the referee is not all that is necessary.

4. The District Court could acquire no jurisdiction over the subject matter unless the fact appeared in the record that the petitioner had made application to the commission for a rehearing.

5. If the complaint does not allege the filing of a petition for review provided by Statute, the Court acquires no jurisdiction, and the point may be raised by demurrer. EN BANC.

Opinion by Mr. Chief Justice Burke. Mr. Justice Knous and Mr. Justice Holland concur in the conclusion. Mr. Justice Bouck dissents.

QUIET TITLE—PARTIES—TAXATION—CERTIFICATES OF TAXES DUE—FAILURE OF TREASURER TO LIST TAX—*City and County of Denver, etc., vs. Highlander Boy Foundation*—No. 14232—*Decided April 11, 1938—District Court of Denver—Hon. Robert W. Steele, Judge—Affirmed.*

FACTS: Action to quiet title to certain real estate against the purported lien of a special improvement tax. The City demurred on ground of insufficient facts and defect of parties. The lower Court overruled the demurrers.

HELD: 1. The assumption that the tax imports bondholders whose securities must be paid from it and that such bondholders were necessary parties, is unsupported, and if otherwise, they stand to lose nothing; and therefore, the bondholders need not be made parties.

2. The City lost its lien for the tax involved by reason of the fact that its treasurer, in compliance with a statutory request, for a Certificate of "taxes due" furnished one which omitted said tax. Sec. 218, Chap. 142, 1935 C.S.A. (Sec. 7392, C. L. 1921), provides that the certificate, with receipt showing payment of taxes, "shall be conclusive evidence for all purposes and against all persons" that the

tract "was at the time free and clear of all taxes." Loss from any error in such certificate and receipt shall be paid by the County.

3. Although Denver is a home-rule City, all general statutes of the State apply to it if not superseded by charter ordinance.

4. Section 34 of the City's Charter of March 29, 1904, provides that the assessor shall provide in the assessment roll of taxes a column wherein the treasurer may make memoranda of special assessments, etc., and that no error, failure, neglect or default on the part of the assessor or treasurer in complying with the provisions of this section shall invalidate any tax or assessment or affect the lien thereof. This provision does not conflict with the statute for here is no provision for a formal mandatory certificate for a special consideration, but something different, a mere notation, unsigned and without consideration. EN BANC.

Opinion by Mr. Chief Justice Burke. Mr. Justice Bouck, Mr. Justice Knous and Mr. Justice Holland, dissent.

TAXATION—VALUATION—CHARITABLE ORGANIZATIONS—EXEMPTION—*Hanagan et al. vs. Rocky Ford Knights of Pythias Building Association*—No. 14102—*Decided January 10, 1938—District Court of Otero County—Hon. William B. Stewart, Judge—Reversed.*

HELD: 1. Where the trial Court finds that a lodge is a charitable organization, and that a portion of the building used by it is devoted to charitable purposes, the Supreme Court will not disturb such finding unless there is no substantial evidence to support such a finding.

2. Where a charitable organization owns a building, one floor of which is rented to others for revenue producing purposes, and the second floor is used, without charge, for its meetings, it is necessary for the taxing authorities to make a fair and equitable separate valuation and assessment of that part of the property used solely for revenue producing purposes.

3. Where the taxing authority assessed the lot upon which the two story building stood for its full valuation and assessed the building as though it were a one story building, such assessment does not provide for an equitable division of the real estate for taxation and exemption purposes.

4. The trial Court must determine the proportionate part of the building subject to exemption, and the same proportion of the lot is to be exempt. EN BANC.

Opinion by Mr. Justice Young. Mr. Justice Hilliard, Mr. Justice Bouck and Mr. Justice Holland dissent.

MANDAMUS—CONSTITUTIONAL LAW—*Hudson and Plummer vs. Annear, etc.*—No. 14230—*Decided January 10, 1938—District Court of Denver—Hon. Otto Bock, Judge—Reversed.*

FACTS: H was elected State Senator and P was elected State Representative. While they served, the General Assembly enacted an income tax law which provided that it was to be administered by the State Treasurer who was given the power to employ such persons as were necessary in the performance of the duties prescribed by the act and to "delegate to any person so appointed, such power and authority as he deems reasonable and proper for the administration of this act."

H and P were appointed Division Chief Field Deputies under the act. The State Auditor refused to issue warrants for salaries on the ground that they were members of the General Assembly when the law under which they were appointed was passed, and were such members when appointed and during the time for which they claimed compensation. This was alleged by the Auditor to be in violation of Article III, and sections 6, 8 and 9 of Article V of the State Constitution.

HELD: 1. Although an "office" is an "employment," it does not follow that every "employment" is an "office." The positions to which the men were appointed are not "civil offices" within the meaning of the Constitution. They were not required to take an official oath, or to give bond, or to do other than to proceed with the discharge of duties assigned from time to time by the State Treasurer.

2. Where no inherent disqualification for preferment attends the appointees, and others professing superior, legal rights thereto are not complaining, the judicial department will not intrude into a situation which concerns only the other two departments (executive and legislative), particularly where they are not in disagreement. EN BANC.

Opinion by Mr. Justice Hilliard. Mr. Chief Justice Burke dissents.

CONSTITUTIONAL LAW—*Police Protective Association of Colorado et al vs. Warren et al.—Decided January 10, 1938—District Court Weld County—Hon. Frederich W. Clark, Judge—Reversed.*

FACTS: Suit by taxpayer, for himself and other similarly situated, against the tax officials of Weld County to enjoin them from levying a tax to augment the Policemen's Pension Fund under Chapter 205, S. L. 1937. The Police Protective Association of Denver was made a party and, along with other such associations, gave evidence tending to show that no small part of the duties of the Policemen was outside of the corporate limits of the cities and towns. The trial Court rendered judgment for the plaintiff, holding that the Act in question providing for a .2 mill levy for the fund was unconstitutional as viola-

tive of Sec. 7, Article X of the State Constitution. This provides that the General Assembly shall not impose taxes for the purposes of any County, City, Town or other Municipal Corporation, etc.

HELD: 1. Functions of Police Officers, from their nature and the facts surrounding them may be either a state purpose or a municipal purpose, and are subject to legislative control.

2. The work of Police Officers is not strictly for County benefit; it is for a purpose in which the entire state is concerned and from which it will benefit.

3. The purpose of the Supreme Court is not to search for reasons why a law should be held unconstitutional, but rather to accept it as constitutional, unless its repugnancy to the fundamental law clearly appears.

4. "To the extent the police forces of the various cities and towns serve a state purpose, which has been shown, the General Assembly could with propriety pass the Act of 1937, and not violate said Section 7 of Article X of the State Constitution." EN BANC.

Opinion by Mr. Justice Bakke.

EQUITY—JUDGMENT—LACHES—EVIDENCE—*Meyer et al vs. Milliken et al.*—No. 14155—*Decided December 27, 1937—District Court Denver—Hon. Robert W. Steele, Judge—Reversed and Remanded.*

HELD: 1. Where the authorities tend to support, and the Court finds merit in, both the cause of action and the defenses thereto, equity requires that the substance of the controversy controls the Court's consideration and decision rather than exactness and form.

2. A judgment must have a basis for its existence as a valid judgment and a Court may not find that a claimant has validly assigned his claim and then enter judgment on the claim in his favor. Such inconsistency causes the judgment to result in a mere nullity.

3. The Supreme Court will not approve a judgment of a Court of another state based upon an alleged cause of action which by judicial ascertainment it is established had been sold and assigned by the plaintiff to another for a valid consideration.

4. A Court of this state unquestionably has the power to enjoin the enforcement of a foreign judgment, palpably void upon its face, between citizens of this state who are before the Court and in the state.

5. Laches may not be presented as a valid defense where it appears that the plaintiff continually made inquiry concerning the retained money and no rights of innocent third parties intervened, and where no circumstances legally required defendant to change its position to its prejudice.

6. Where the controlling features of a case are largely documentary, the Supreme Court is in as good a position to pass upon the merits as was the trial Court and consequently the former is not bound by the latter's findings.

7. The Courts of this state will afford its citizens relief against the enforcement of a void judgment and will not compel them to resort to a foreign tribunal. EN BANC.

Opinion by Mr. Justice Holland. Mr. Justice Bouck dissenting.

PARTNERSHIP — AGREEMENT OF SURVIVORSHIP — LOST INSTRUMENTS—EVIDENCE—TRUSTS—*Walker et al. vs. Dragmund*—No. 13873—*Decided December 27, 1937—District Court of Lake County—Hon. William H. Luby, Judge—Affirmed in Part and Reversed in Part.*

FACTS: Plaintiff and decedent were partners. Plaintiff contended that there was a written Contract of Partnership containing a covenant providing that upon the death of either partner, the interest of the decedent should vest in the survivor and asked that the Court appoint a Commissioner to convey the property to plaintiff and that she be declared to be the sole owner as against heirs of decedent. Trial Court resolved all the issues in favor of plaintiff, except as to one piece of property.

HELD: 1. Partners may enter into an agreement that, upon a certain contingency, one of them shall succeed to all of the partnership assets.

2. Where such an agreement is relied upon and is lost, the secondary evidence proving the contents must be clear and satisfactory. While ordinarily it is not necessary that witnesses should be able to tell the contents with absolute verbal accuracy, where specific performance is sought, proof of the precise terms of the agreement is indispensable. The evidence must be "strong and unequivocal."

3. Secondary evidence as to the contents of an instrument must give its language, and a statement of the witness of his conclusion as to its legal effect is not sufficient.

4. The right of a survivor is preferred above any devise or testamentary conveyance which decedent can make, and any attempt to devise property affected by survivorship is evidence inconsistent with such status.

5. Evidence considered and found to support a judgment that a partnership existed, imposing a resulting trust in favor of the partnership upon the property designated by the trial Court and standing in the name of the decedent at the time of his death, but the evidence is not sufficient to prove survivorship. EN BANC.

Opinion by Mr. Justice Knous. Mr. Justice Bouck, Mr. Justice Bakke and Mr. Justice Holland dissent.